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No. 93-1631

Supreme Court, U.S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1993

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LLOYD BENTSEN, SECRETARY OF THE TREASURY,  
ET AL., PETITIONERS

*v.*

ADOLPH COORS COMPANY

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONERS**

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Respondent contends that certiorari is unwarranted because the Tenth Circuit's decision "does nothing more" than declare unconstitutional what respondent dismisses as a "relatively minor" Act of Congress. Br. in Opp. 4, 16. But "a decision to declare an act of Congress unconstitutional 'is the gravest and most delicate duty that [a court] is called on to perform,'" *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)), and the Act at issue here, far from being "relatively minor," governs the sale of malt beverages nationwide. Furthermore, the Tenth Circuit's decision—which upheld respondent's First Amendment challenge to the provision in the Federal Alcohol Administration Act (FAAA) that prohibits statements of alcohol content on the labels of malt beverages, 27 U.S.C.

205(e)(2)—also casts serious doubt on similar labeling restrictions that have been adopted by the majority of the States. A decision with such far-ranging effects warrants review by this Court.

1. In contending to the contrary, respondent first argues (Br. in Opp. 6, 16) that decisions, such as the Tenth Circuit's, that apply the four-part test articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), for analyzing restrictions on commercial speech do not warrant further review, because the *Central Hudson* test "has been firmly settled since at least 1980 \* \* \* [and] [t]he federal judiciary needs no Supreme Court guidance on this well settled test" (Br. in Opp. 16). That categorical argument is refuted by respondent's own submission, which recognizes (Br. in Opp. 6 n.4, 18) that this Court has reviewed decisions applying *Central Hudson* on numerous occasions in the last decade. On one of the most recent occasions, the Court granted certiorari "[b]ecause the court below declared a federal statute unconstitutional and applied reasoning that was questionable under [the Court's] cases relating to the regulation of commercial speech." *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993). The same is true here.

2. Our challenge to the Tenth Circuit's reasoning is not "evidentiary in nature," as respondent suggests (Br. in Opp. 9; see also *id.* at 4, 7-9). To the contrary, our petition identifies five legal errors in the Tenth Circuit's analysis, each of which has broad significance for commercial speech jurisprudence.

First, the Tenth Circuit did not fully identify the federal interests underlying the prohibition in Section 205(e)(2) against statements of alcohol content on malt-beverage containers. See Pet. 13-15. Specifically, the Tenth Circuit ignored evidence in the text and legislative history of the FAAA that Section 205(e)(2) was designed to operate in

tandem with state laws regulating alcohol.<sup>1</sup> Because the Tenth Circuit did not accurately identify the "asserted governmental interest" underlying the challenged statute, as required under the second part of the *Central Hudson* test, it erred in determining whether the challenged statute "directly advances" the asserted governmental interest, as required under the third part of the test. *Central Hudson*, 447 U.S. at 566. That is the same sort of error that led this Court to reverse the Fourth Circuit's decision in *Edge Broadcasting*. Pet. 14. The error is a significant one, for it handicaps federal laws that seek to accommodate state regulation in areas of legitimate state concern. Cf. *Edge Broadcasting*, 113 S. Ct. at 2704.

Second, the Tenth Circuit erred by failing to discern any link between the advertising of a product characteristic (in this case, high alcohol content) and the extent to which consumers choose the product on the basis of that characteristic. Pet. App. 21a; see Pet. 15-16. The link is obvious and essential to the proper analysis of First Amendment challenges to advertising restrictions. This Court has consistently recognized that a restriction on the advertising of a product decreases demand for the product. See *Edge Broadcasting*, 113 S. Ct. at 2707; *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342 (1986); *Central Hudson*, 447 U.S. at 569. It follows that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select the product on the basis of that characteristic. Recognition of that common-sense principle underlies the

<sup>1</sup> Contrary to respondent's contention (Br. in Opp. 15 n.7), the government did argue in the Tenth Circuit that the advertising and labeling restrictions in the FAAA were intended to facilitate the enforcement of state laws regulating alcohol. See 89-1203 & 89-1239 Opening Br. for the Defendants-Appellants 24-25 & n.8; see also 89-1203 & 89-1239 Reply Br. for the Defendants-Appellants 5; 89-1203 Br. of Appellants, the Speaker and Bipartisan Leadership Group of the U.S. House of Reps. 10, 11 n.7. That purpose, moreover, is clear on the face of the statute. See Pet. 4-5, 15 & n.14.

decisions upholding state restrictions on the advertising of alcoholic beverage prices against First Amendment challenges. See, e.g., *Queensgate Investment Co. v. Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio) (per curiam), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982), cited with approval in *Edge Broadcasting*, 113 S. Ct. at 2707; see also *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (en banc) (upholding against First Amendment challenge state law banning liquor advertising by local media), cert. denied, 467 U.S. 1259 (1984), cited with approval in *Posadas*, 478 U.S. at 347 n.10. Those decisions and the Tenth Circuit's decision in this case cannot be reconciled. Pet. 17 & n.16.<sup>2</sup>

Third, the Tenth Circuit misread *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), as adopting a "much stricter" standard for applying the third part of the *Central Hudson* test. Pet. App. 5a; see Pet. 19-20. Based on that erroneous reading, the Tenth Circuit accorded no weight to the enactment history of the FAAA. At the same time, the court acknowledged that the history contained evidence that (1) "labels displaying alcohol content resulted in a strength war" among the brewers of malt beverages, and (2) the labeling restriction in Section 205(e)(2) would "result[] over the long term in beers with a lower alcohol content." Pet. App. 6a. It is clear from that evidence that, at the time of its enactment, Section 205(e)(2) directly advanced the government's interest in preventing strength wars. The Tenth Circuit's determination that Section 205(e)(2) no longer does so was based on what the court perceived as post-enactment "changes in the malt beverage industry." Pet. App. 6a. That approach is not justified by *Edenfield*, and it is at odds with other

<sup>2</sup> Thus, contrary to respondent's assertion (Br. in Opp. 5 n.2), we do rely on Rule 10.1(a) of the Rules of this Court (as well as on Rule 10.1(c)) in seeking certiorari, based on the clear conflict in approach between the decision below and decisions of State courts of last resort, such as *Queensgate*. Pet. 17 n.16.

decisions in which this Court has examined the history of statutes challenged on First Amendment grounds. See, e.g., *Burson v. Freeman*, 112 S. Ct. 1846, 1856 (1992) (plurality).<sup>3</sup>

Fourth, the Tenth Circuit failed to explain why the government's evidence was not sufficient to sustain the labeling restriction in Section 205(e)(2), while the same evidence was held sufficient, in a ruling by the district court that respondent did not challenge on appeal, to sustain the advertising restriction in Section 205(f)(2). Pet. 20-21.<sup>4</sup> The district court attempted to justify that apparently anomalous result on the ground that Section 205(e)(2)'s prohibition of alcohol content statements on labels does not add much to what is accomplished by Section 205(f)(2)'s prohibition of such statements in advertising. Pet. App. 37a-38a. In *Edge Broadcasting*, however, this Court condemned similar reasoning as "represent[ing] too limited a view of what amounts to direct advancement of the governmental interest," 113 S. Ct. at 2706, and as failing to allow adequate "room for legislative judgments," *id.* at 2707.<sup>5</sup>

<sup>3</sup> Respondent's lengthy discussion of *Edenfield* (Br. in Opp. 9-15) is devoted to refuting an argument that we have not made in the certiorari petition. Contrary to respondent's assertion (*id.* at 9), the petition does not argue that *Edenfield* replaced the "'directly advances' test" with a "'reasonably believed' test." Our argument, instead, is that *Edenfield* does not support the court of appeals' failure to consider the enactment history of the FAAA in determining whether Section 205(e)(2) "directly advances" the asserted governmental interest. See Pet. 19.

<sup>4</sup> Respondent states that its challenge to the advertising restriction in Section 205(f)(2) was "dropped at trial" (Br. in Opp. 2 n.1), but fails to mention that the district court rejected that challenge on the merits (see Pet. App. 34a).

<sup>5</sup> Respondent contends (Br. in Opp. 14) that *Edge Broadcasting* is inapposite because it dealt with the issue whether, in reviewing a statute under the third part of the *Central Hudson* test, a court is limited to considering whether the asserted governmental interest is directly advanced by applying the statute to the entity challenging it.

*Fifth*, the Tenth Circuit erroneously based its holding that Section 205(e)(2) fails the third part of the *Central Hudson* test on a factor that should have been analyzed under the fourth part of the *Central Hudson* test and that, if properly analyzed, would have been insufficient to strike down the statute. As we explain in the certiorari petition (at 20), the Tenth Circuit concluded that Section 205(e)(2) does not directly advance the government's interest in preventing strength wars because it applies to the labeling of all types of malt beverages, whereas the evidence of a continuing threat of strength wars, in the court's view, primarily concerns only one type of malt beverage: so-called "malt liquor." For purposes of our petition, we accept the court of appeals' determination (Pet. App. 7a) that the current evidence of a continuing threat of strength wars primarily concerns malt liquor. But see Pet. 11 (discussing evidence of strength wars outside the malt liquor segment of the market). That determination, however, is relevant not to the question whether the labeling restriction directly advances the government's purpose of preventing strength wars, but rather to the question whether the labeling restriction is "more extensive than is necessary" to achieve that purpose. *Board of Trustees v. Fox*, 492 U.S. 469, 475-481 (1989). The

Respondent fails to grasp the basis of the Court's reasoning. The Court in *Edge Broadcasting* rejected a radio station's contention that the federal statutes that restrict lottery advertising do not directly advance the government's interest in decreasing gambling in States that do not operate lotteries because the statutes only modestly decreased the amount of lottery advertising to which people who listened to the radio station were exposed. *Edge Broadcasting*, 113 S. Ct. at 2706-2707. Respondent advanced, and the Tenth Circuit accepted, a similar contention here: namely, that Section 205(e)(2) does not directly advance the government's interest in preventing strength wars, because it only modestly decreases the extent to which beer can be marketed based on its high alcohol content, in light of the other labeling and advertising restrictions on statements of alcohol content that respondent does not challenge.

latter question is one of "reasonable fit," and therefore should have been considered under the fourth, not the third, part of the *Central Hudson* test.

If the Tenth Circuit had properly considered the issue of reasonable fit under the fourth part of the *Central Hudson* test, it would have been obligated to accord deference to Congress's judgment on the fit between legislative means and ends. See, e.g., *Edge Broadcasting*, 113 S. Ct. at 2707. And if the court had done so, it would have had to conclude that there is a reasonable fit between the scope of the labeling restriction and the prevention of strength wars. As explained in the petition (at 22-23), Congress reasonably could conclude that a labeling restriction that applies to all types of malt beverages is more effective in preventing strength wars than one that applies only to malt liquor.<sup>6</sup>

<sup>6</sup> Respondent does not accurately characterize the record or the court of appeals' assessment of it. For example, respondent asserts that it proved that "no strength wars have developed in various states such as Minnesota, and in numerous countries including Canada \* \* \*, where alcohol content appears on malt beverage labels." Br. in Opp. 8. Respondent fails to mention, however, that the court of appeals found that the evidence "support[ed] the Government's assertion that there is a continuing threat of strength wars" and that respondent "d[id] not contest \* \* \* the existence of such a threat" in the court of appeals. Pet. App. 7a. In any event, the current absence of strength wars in Minnesota or any other State does not establish that no threat of them exists, because Minnesota and every other State ban some statements of alcohol content on malt beverage labels, at least under certain circumstances. Pet. 23-27 & 26 n.23. Moreover, the federal restriction on the *advertising* of the alcohol content of malt beverages (27 U.S.C. 205(f)(2)) applies in every State, to the extent consistent with state law. The evidence concerning Canada included the fact that respondent produces its own beer with higher alcohol content in that country than in the United States, and that the demand for "light beer" is considerably lower in Canada than in the United States. II Tr. 228-229, 231. Respondent further asserts that the record showed that "there is no incentive for brewers to engage in strength wars." Br. in Opp. 8. That assertion is belied by the abundant evidence that respondent and other brewers have aggressively (and in many cases, illegally) marketed

3. We argue in the certiorari petition that, instead of applying a "much stricter" standard than this Court has applied in *Central Hudson* and its progeny, the Tenth Circuit should have applied a *less* stringent standard in reviewing respondent's First Amendment challenge to Section 205(e)(2). Pet. 19-20. That argument is based on the fact that Section 205(e)(2) was intended to operate in tandem with and facilitate the enforcement of state laws regulating alcoholic beverage labeling and advertising, and that, by virtue of the Twenty-First Amendment, such state laws are entitled to an "added presumption in favor of \* \* \* validity," *California v. LaRue*, 409 U.S. 109, 118 (1972), when challenged on First Amendment grounds.

Respondent never comes to grips with our argument.<sup>7</sup> It does not dispute our submission that Congress intended in enacting Section 205(e)(2) to facilitate the enforcement of state laws regulating alcohol. Nor does it dispute that a state law identical to Section 205(e)(2) would be entitled under *LaRue* to an "added presumption" of validity in a First Amendment challenge. Finally, respondent does not attempt to justify a scheme of First Amendment review under which a *state* law could be upheld while a *federal* law integrally related to the effective enforcement of the state law could be invalidated. And nothing in the language of the Twenty-First Amendment justifies such a dual standard.<sup>8</sup>

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their beer based on its high alcohol content. Pet. 10-11. Respondent also asserts that "it is common knowledge that malt *liquors* have higher alcohol content than regular beer[s]." Br. in Opp. 9. Respondent's own official testified to the contrary. II Tr. 194 (quoted in Pet. 22).

<sup>7</sup> Instead, respondent asserts that we did not make that argument below; but, as explained in note 1, *supra*, respondent is wrong.

<sup>8</sup> The significant authority over alcohol conferred by "the broad sweep of the Twenty-first Amendment" (*LaRue*, 409 U.S. at 114) is not limited to the States. The Amendment also applies to "Territor[ies]" and "possession[s]" of the United States, which are governed by federal law. See U.S. Const. Art. IV, § 3. Moreover, Congress has concluded in the FAAA and other statutes that the Amendment authorizes it to

4. Respondent does not, in the end, take issue with our submission (Pet. 23-27) that the Tenth Circuit's decision casts serious doubt on the constitutionality of the laws regulating malt beverage labeling that have been adopted in the majority of the States, including every State in the Tenth Circuit. Although respondent notes that "the constitutionality of any particular state law or regulation is not at issue in this case," Br. in Opp. 17, it is doubtful that respondent (or any other brewer) would eschew reliance on the Tenth Circuit's decision in a challenge to one of the numerous state laws modeled on the federal provision that the Tenth Circuit has struck down.

Moreover, the confusion and doubts resulting from the Tenth Circuit's decision are not limited to its impact on state laws. The decision below also creates disuniformity among geographic regions and between respondents and its competitors with respect to the constitutional authority of the Secretary of the Treasury to enforce Section 205(e)(2) itself. Especially in these circumstances, the Tenth Circuit's decision holding an Act of Congress unconstitutional warrants review by this Court.

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For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III  
Solicitor General

MAY 1994

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enact legislation facilitating the enforcement of state laws regulating alcohol. See 27 U.S.C. 203; 18 U.S.C. 1262 (making it a federal crime to import "any intoxicating liquor" into a State in violation of state law).